84-1900 (1)

Office - Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

In the

SUPREME COURT

OF THE UNITED STATES

No. 84-5014

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK JOSEPH BROWN,

Appellant.

PETITION FOR WRIT

CERTIORARI
To United States Court of Appeals
Fourth Circuit

W. A. CORNER
P.O. Box 8631
Asheville, NC 28814
704/252-8970

app

QUESTIONS FOR REVIEW

The Petitioner is presenting three questions for review by the honorable court:

1. Can a Judge acting as both trier of the facts (no jury) and the law consider facts not in evidence in arriving at a decision as to guilt or innocence?

2. Can a Judge acting as a trier of the facts take Judicial notice of a fact without so noting such notice on the record?

3. Can a conviction result without proving all of the elements of the crime?

There is nothing in the record to show that the substances charged in the

indictment as being the substances which were prescribed were in fact on the schedule II or Schedule IV of Title 21 United States Code, section 812. No evidence was introduced as to the substances enumerated on these two schedules included the substance which is the subject of this indictment. At no time was the Judge asked to take Judicial Notice of the contents of the statute, nor did he of his own motion take Judicial Notice of the contents of these two schedules in Title 21 United States Code, Section 812.

Reference

United States Code 21-812 4

United States Code 28-2101 5

Garner v. Louisiana
72ed 2nd 207 6

Thompson v. City of Louisville
4Led 2nd 654 6

Barr v. Columbia
12Led 2nd 766 6

Malloy v. Hogan
12Led 653 9

TABLE OF CONTENTS

Questions for Review	1
References	3
Opinions Delivered	5
Constitutional Provisions and Federal Questions	7
Statement of Case	9
Statement of Facts	12
Reasons for Relief	14

No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

OPINIONS DELIVERED

1. Judgment of the United States District Court for the Western District of North Carolina, December 12, 1983 (App. I).
2. Judgment of the United States Court of Appeals for the Fourth District, January 23, 1985 (App. II).
3. Denial of the United States Court of Appeals for the Fourth District of a petition for rehearing, March 7, 1985 (App. III).
4. Denial of a motion for a new trial

in the United States District Court for the Western District of North Carolina, March 12, 1985.

United States Code 28-2101 confers jurisdiction for review. Criminal action instituted by government.

CONSTITUTIONAL PROVISION AND FEDERAL QUESTIONS INVOLVED

1. The conviction of the appellant without testimony establishing proof of all the elements of the crime charged is unconstitutional under the due process clause of the Fourteenth Amendment: "A State conviction for a crime totally devoid of evidentiary support is unconstitutional under the due process clause of the Fourteenth Amendment." Garner v. Louisiana 7Led 2nd 207; Thompson v. City of Louisville, 4Led 2nd 654; Barr v. Columbia 12Led 2nd 766.

2. The decision of the United States Court of Appeals for the Fourth District is completely in contradic-

tion to the above decisions and was ignored by said Court.

STATEMENT OF THE CASE

1. The record is completely devoid of any testimony as to the content of or the items and/or substances enumerated on Schedule II or Schedule IV of Title 21, Section 812. No testimony was introduced establishing the substances alleged to have been the subject of the prescriptions involved were in fact controlled substances set forth on schedule or list or authorized to be issued under Title 21 Section 812 of the United States Codes.

2. It is not denied that the Presiding Judge as trier of the law could have taken Judicial Notice of the Schedule II and/or Schedule IV of said Title 21, Section 812, but there is

nothing in the record to indicate he did; in fact, Judicial Notice is not mentioned.

3. As the trier of the facts in a non-jury trial, the Judge is bound by the evidence as presented, not on any facts he may know of his personal knowledge. "As a matter of Constitutional Law, the due process clause of the Fourteenth Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Malloy v. Hogan 12Led 653.

4. The Schedule II and/or Schedule IV Title 21, Section 812 were never introduced nor the subject of the

substances enumerated therein established or entered into testimony; consequently no evidence of the substances established, leaving a fact or element of the crime charged not proven.

STATEMENT OF FACTS

Frank Joseph Brown was charged in a nine (9) count bill of Indictment with five (5) counts of unlawfully obtaining possession of Schedule II controlled substances, that is, Biphetamine and Percodan, by misrepresentation, deception and subterfuge, in obtaining a prescription for the Schedule II controlled substances, in violation of Title 21, United States Code, Section 843(a)(3), and four (4) counts of distributing controlled substances outside the usual course of his professional practice, in violation of Title 21, United States Code, Section 841(a)(1). The Appellant requested a non-jury trial and appeared pro se. Judge Woodrow W. Jones entered a verdict of not guilty to count four (4) and a verdict of guilty to the remaining

counts in the bill of indictment. At the close of the government's evidence, the trial court dismissed count five (5) in the indictment upon motion of the United States. Counts one, two and three, were consolidated for the purposes of judgment and the Appellant was sentenced to three years imprisonment. Counts six, seven, eight and nine were consolidated for the purposes of judgment and the Appellant was sentenced to three years imprisonment to run concurrently with the sentence imposed in counts one, two and three. The court further imposed a special parole term of three years pursuant to Title 21, United States Code, Section 841(b)(1)(A).

REASONS FOR RELIEF

The District Court and the Court of Appeals for the Fourth District have violated the Appellant's rights under the due process clause of the Fourteenth Amendment to the Constitution by allowing a conviction to stand for a crime which has not been properly proved to have been committed.

The Judge may not when acting as a trier of the facts decide the case on facts not in evidence. Malloy v. Hogan 12Led 653.

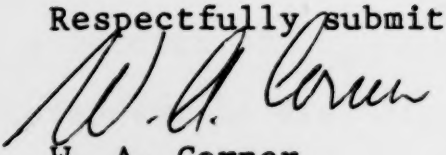
No Judicial Notice of the substances charged to be illegally prescribed was noted, nor was any testimony introduced proving they were in violation of the law or subject matter of the crime charged. The Court of Appeals cited United States

v. Harrison 651F2nd 353 (5th Cir.) cert. denied 454 U.S. 1126 as their authority for stating that the Judicial Notice was sufficient. The appellant does not deny this; however, the appellant does contend that Judicial Notice must be of the record and in evidence in order to convict a person charged; if it is not on the record it is not in evidence and cannot be considered for conviction. In the Harrison case Judicial Notice was noted and on the record; in the subject case it was not.

Based upon the foregoing agreements and authorities, the petitioner prays that his Petition for Writ of Certiorari to the United States Court of Appeals for

the Fourth Circuit be granted.

Respectfully submitted,



W. A. Corner
P.O. Box 8631
Asheville, NC 28804
704/252-8970

Attorney for Petitioner

APPENDIX I

There being a verdict of

_x_ NOT GUILTY, Defendant is discharged as to Ct. 4 of the Bill of Indictment.

_x_ GUILTY, as to Cts. 1, 2, 3, 6, 7, 8, 9 of the Bill of Indictment.

Defendant has been convicted as charged of the offenses(s) of unlawfully obtain possession of a Schedule controlled substance by misrepresentation in obtaining a prescription for said controlled substance in violation of Title 21, United States Code, Section 843(a)(3) as charged in Counts 1, 2, 3 of the Bill of Indictment; distribution of a controlled substance outside the usual course of professional practice in violation of Title 21, United States Code, Section 841(a)(1) as charged in Counts 6, 7, 8, 9 of the Bill of Indictment.

Count 5 of the Bill of Indictment dismissed upon motion of the United States Attorney.

COUNTS 1, 2, 3 CONSOLIDATED FOR JUDGMENT: THREE (3) YEARS.

COUNTS 6, 7, 8, 9 CONSOLIDATED FOR JUDGMENT: THREE (3) YEARS. This sentence is to run concurrently with the sentence imposed in Counts 1, 2, and 3. Court further imposes a special parole term of THREE (3) YEARS, pursuant to Title 21, United States Court Section 841(b)(1)(A).

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-5014

United States of America,

Appellee,

versus

Frank Joseph Brown,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow W. Jones, District Judge. (Cr. No. SH-83-90)

Submitted: November 21, 1984

Decided: January 23, 1985

Before HALL, PHILLIPS and MURNAGHAN,

Circuit Judges.

(W. A. Corner, on brief) for Appellant.

(Charles R. Brewer, United States Attorney, Jerry W. Miller, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Frank Joseph Brown, who was at the time of his arrest a practicing physician in Morganton, North Carolina, appeals from his conviction on seven counts of a nine-count indictment for violations of the federal narcotics laws. Having waived a jury, Brown was tried by the district judge and was convicted on three counts of obtaining Biphetamine, a Schedule II controlled substance, by misrepresentation, deception and subterfuge in violation of 21 U.S.C. § 843(a)(3); on two counts of unlawfully distributing Placidyl, a Schedule IV controlled substance, outside the course of his professional practice in violation of 21 U.S.C. § 841(a)(1); on one count of unlawfully distributing Dilaudid, a Schedule II controlled substance, outside

the course of his professional practice in violation of 21 U.S.C. § 841(a)(1); and on one count of unlawfully distributing Percodan, a Schedule II controlled substance, outside the course of his professional practice in violation of 21 U.S.C. § 841 (a)(1).

Brown argues on appeal that no evidence was introduced to show that the substances involved were controlled substances; that the indictment improperly charged him with unlawful distribution rather than unlawful dispensation; that the evidence was insufficient to establish any misrepresentation on his part; that the substance alleged to be Dilaudid was not shown to be a drug of any type; and that, in light of Brown's waiver of counsel, the district court provided too little assistance in

assuring the attendance of witnesses and facilitating the introduction of evidence. We affirm the judgment of conviction.

We find Brown's argument that there was insufficient evidence to establish that the substances involved were controlled substances to lack merit. The district court was entitled to take judicial notice of the lists of controlled substances published at 21 U.S.C. § 812 and 21 C.F.R. §§ 1308.01 et seq. See United States v. Harrison, 651 F.2d 353 (5th Cir.), cert. denied, 454 U.S. 1126 (1981). With regard to Biphetamine, Brown himself testified that this was a trade name for amphetamine. Amphetamine is listed as a Schedule II controlled substance. 21 C.F.R. § 1308.12(d)(1). With regard to Percodan, Dr. Severn

late. Oxycodone is listed as a Schedule II controlled substance. 21 C.F.R. § 1308.12(b)(1)(14). With regard to Dilaudid, the evidence showed that Brown filled out a Schedule II drug order form for Dilaudid. While no evidence was presented as to the chemical composition of Dilaudid, the Physicians' Desk Reference 1037 (1984) indicates that Dilaudid contains hydromorphone. Hydromorphone is listed as a Schedule II controlled substance. 21 C.F.R. § 1308.12(b)(1)(11). Finally, the Physicians' Desk Reference 561 (1984) lists ethchlorvynol as a component of Placidyl, and ethchlorvynol is contained on the Schedule IV list of controlled substances. 21 C.F.R. § 1308.14(c)(9).

The chemical compositions of Dilaudid and Placidyl constitute facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). As such, judicial notice of their compositions may be taken at any stage of the proceedings, including by final judgment and on appeal. Fed. R. Evid. 201(f). See Government of the Canal Zone v. Burjan, 596 F.2d 690 (5th Cir. 1979); United States v. Dixon, 343 F.2d 510 (7th Cir. 1965). Prior notification of an intention to take judicial notice is not required, and a hearing is necessary only if requested. Fed. R. Evid. 201(e). Brown has not requested a hearing in which he might challenge the judicially noticed facts, and, indeed, one would be

futile in that the narcotics are, as charged, controlled substances. The Physicians' Desk Reference is, for the purpose of determining the chemical compositions of these narcotics, a source whose accuracy cannot reasonably be questioned. Brown, in fact, relied upon this source himself in the presentation of his defense.

APPENDIX III

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-5014

United States of America,

Appellee,

versus

Frank Joseph Brown,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow W. Jones, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge

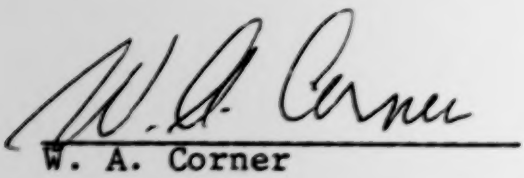
Hall with the concurrence of Judge Phillips and Judge Murnaghan.

For the Court,

JOHN M. GREACEN
CLERK

It is hereby certified that service of the petition has been made on counsel for the respondent by hand delivery to Mr. Jerry Miller, Assistant United States Attorney, and one copy mailed to the

Solicitor General
United States Department of Justice
Washington, DC 20530



W. A. Corner

Attorney for Petitioner